

# Duty of candour

## Position paper

November 2013



We continue to support Robert Francis' proposals for a statutory duty of candour, as anything weaker than this (i.e. the contractual duty) will not act as a sufficient deterrent to, and safeguard from, poor practice. However, we recognise both the Government, and Professor Berwick's, concerns that a statutory duty will not be the full resolution, and agree that there is a wider cultural intervention that is needed to promote greater openness, transparency and candour in both health and social care.

We welcome the intention for the duty to apply to organisations across health and social care in recognition that whilst there shocking failings in Mid Staffordshire and Morecambe Bay, candour must be the bedrock of all health, mental health and social care services, not just hospitals.

However, we are disappointed that the statutory duty was not applied to individuals working in health and social care, and that the government is relying only on professional duties to ensure that patients receive truthful information. Many professional codes of practice across health and social care contain specific mentions of candour and openness, and we are concerned that these did not act as sufficient safeguards in the past. Additionally, there are over half a dozen different professional regulators who would be charged with enforcing the duty, potentially leading to different understandings of what honest communication means based on profession. We believe the duty must also apply to all staff, to mark out those who wilfully cover up incidents, do not provide honest accounts or obstruct others from being candid themselves. A general statutory duty sends a clear message to those involved in health and social care that open, truthful communication is everyone's job.

We are concerned that the threshold at which a duty of candour would be set and urge you to reconsider this in the final regulations. Applying it to only the most serious of cases would mean significant incidents could still be covered up resulting in the tragic failings we read about in the reports of Sir Robert Francis QC, Sir Bruce Keogh, Professor Don Berwick, Rt. Hon. Anne Clwyd MP and Professor Tricia Hart.

Finally, we have found the question of criminal sanctions to be a very complex one and it has taken us a while to reach a conclusion. But our view is as follows:

We think there should be a strong and unequivocal message about the seriousness of violations of the duty to both individuals and organisations, which criminal sanctions could potentially provide. However, we are concerned that individual criminal sanctions, particularly when applied to front line staff, could create a climate of fear that could potentially lead to less openness regarding patient safety issues. The form of any institutional criminal penalties also requires careful consideration to ensure the effects of the sanctions appropriately influence organisational behaviour.

Establishing criminal liability for covering up information about serious incidents could be important in avoiding the escalation of the situation and further abuse, neglect and preventable death occurring. The Government's recent announcement of the creation of a new criminal offences where someone is 'guilty of wilful or reckless neglect or mistreatment' or providing false or misleading information seems to be a sensible step, recognising that criminal sanctions should follow

intentional or reckless wrongdoing. However, our legal advice suggests that there are a number of avenues that could be pursued using existing tools such as misadministration, obstructing an inspection, misconduct in public office, professional disciplinary procedures relating to fitness to practice and contractual sanctions. We believe that existing options merit careful consideration before introducing a new, more wide-ranging offence relating to the duty of candour.

In conclusion, we think the most important action at present is to institute the statutory duty of candour. We think it is important that, an explicit statement of intent is made at the outset, so that the public are clear that organisations and individuals who wilfully cover up incidents, and obstruct others from being candid, will be brought to justice. However, we suggest that discussions about sanctions could continue to evolve as we evaluate the duty's effectiveness.

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